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No. 07-632

FILED
JAN 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

WAGNER-MEINERT, INC.,

*Petitioner,*

*v.*

EDA CONTROLS CORP.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## STATEMENT OF QUESTIONS PRESENTED

1. Whether the Petitioner has presented compelling reasons for this Court to grant the writ of certiorari sought?

2. Whether the Sixth Circuit Court of Appeals correctly upheld and affirmed the judgment of the U.S. District Court for the Northern District of Ohio, Western Division, in dismissing Petitioner's Complaint, pursuant to Fed. R. Civ. P. 12(c)?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent EDA Controls Corp. hereby advises the Court that:

(1) EDA Controls Corp., an Ohio corporation, no longer exists. The company's assets and liabilities were ultimately transferred to PECO II, Inc. of Galion, Ohio, a publicly held corporation. PECO II, Inc., has no parent company and no publicly held corporation owns 10% or more of its stock.

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## STATEMENT OF THE CASE

Prior to May 22, 1995, Petitioner Wagner-Meinert, Inc. ("WMI") an Indiana corporation, contracted with Frozen Specialties, Inc. ("FSI"), a manufacturer, processor, and distributor of frozen pizzas, to design, build and maintain a new refrigeration system at FSI's facility in Archbold, Ohio. Concomitantly, WMI contracted with Respondent EDA Controls Corp. ("EDA") for the design and sale of certain equipment (an "ammonia detection system") to be incorporated into the refrigeration system designed and constructed by WMI at the FSI facility.

On May 22, 1995, EDA and WMI entered into a written contract for the sale and purchase of the ammonia detection system, a tangible good, for the sum of $13,228.00. This price included a one-day, $600.00, "On-Site Start-Up Service" option. WMI attached a copy of this written contract to the Complaint as Exhibits A and B.[1] (App. H1-H21) In relevant part, the contract provided:

> As a [*sic*] option we have quoted our On-Site Start-Up Service. We will provide on-site check-out to insure the system is functioning properly, and train the end-user customer on system operation.

EDA delivered the ammonia detection system to the FSI facility, pursuant to the contract, on or before June

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[1] All references to the Appendix in this brief refer to Petitioner's Appendix in its Petition for Writ of Certiorari.

26, 1995. (App. H20) The one-day, on-site start-up service option was conducted on August 2, 1995. Nearly four years later, on June 16, 1999, a fire of unknown origin occurred at FSI, causing fire damage to the FSI facility in the amount of $12,744,126.93. (App. H4-H5) At the time of the fire, FSI was insured under a policy of property insurance issued by Atlantic Mutual Insurance Company, which paid the fire loss, thereby acceding to FSI's rights. On June 15, 2001, Atlantic Mutual filed a subrogation action against WMI in the United States District Court for the Northern District of Ohio, Western Division, Case No. 3:01CV7302. (App. H22) EDA was not included as a party-defendant, nor was EDA impleaded as a third-party defendant by WMI. The case was assigned to Judge David A. Katz.

The Complaint filed by Atlantic Mutual asserted claims against WMI in tort and breach of contract. However, immediately prior to the jury trial on March 29, 2004, Atlantic Mutual dismissed the tort claims against WMI. On April 8, 2004, the jury returned a verdict in favor of Atlantic Mutual on two of the five breach of contract claims, and awarded contract damages against WMI in the amount of $2,500,000.00. The parties subsequently compromised a dispute regarding the pre-judgment interest issue, and the case was settled for $3,000,000.00. (App. B3-B4)

Three months prior to the Atlantic Mutual/WMI trial, on January 21, 2004, WMI filed the instant lawsuit against EDA. (App. H1) The case was assigned to District Court Chief Judge James G. Carr, who stayed further proceedings pending resolution of the underlying Atlantic Mutual/WMI litigation. Upon conclusion of that

trial, Judge Carr reactivated this lawsuit. Upon reactivation, EDA filed its Motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c), on December 13, 2005. (App. F1) On April 12, 2006, Judge Carr sustained the motion. (App. C1-C10; D1)

Petitioner appealed to the United States Sixth Circuit Court of Appeals. The case was briefed, and the decision of the U.S. District Court was affirmed on February 23, 2007. (App. B1-B9) Petitioner filed a Petition for Rehearing, and the Petition was denied on July 30, 2007. (App. A1) WMI filed its Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on October 25, 2007.

## MISSTATEMENTS OF FACT AND LAW IN THE PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 15.2 requires a respondent to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." The petition filed by WMI in this case asks this Court, in part, to "clarify" whether ". . . the 'predominant factor test,' as applied in commercial (UCC) mixed contracts, may be decided by the court as a matter of law, or is an 'issue of fact' to be determined by a jury." However, as Respondent argued in the Courts below, the predominant purpose test is a non-issue in this case, and did not need to be considered by the lower Courts.

If writ of certiorari is granted in this case, the single issue for this Court's determination is whether the District Court properly sustained Respondent's Motion

for Judgment on the Pleadings, filed pursuant to Fed. R. Civ. P. 12(c). Respondent filed the motion because the Complaint filed by Petitioner failed to assert a legally cognizable claim upon which relief could be granted.

The Complaint (App. H1-H39) asserts, ostensibly, six separate legal claims: 1) breach of express written contract; 2) breach of express oral contract; 3) breach of implied contract; 4) express indemnification; 5) implied indemnification, based upon principles of active/passive negligence; and 6) statutory contribution, pursuant to O.R.C. §2307.25. However, examination of these claims, *in light of the relief sought*, effectively eliminates five of these claims from further consideration.

While the Complaint *appears* to articulate six separate legal claims, the Complaint actually asserts only a *single* claim for indemnification: Petitioner seeks complete reimbursement of the jury award against WMI for breach of contract and in favor of Atlantic Mutual in the companion litigation. Alternatively stated, the Respondent does *not* seek damages for negligence or breach of contract. Rather, Petitioner is seeking full indemnification from the Respondent for the jury award. This conclusion is based upon the specific language contained in *each* of the six "Counts" asserted in the Complaint: ". . . should WMI be found liable to Atlantic Mutual in the original lawsuit, *EDA must fully indemnify WMI from any such resulting judgment.*" (Emphasis added).

It is apparent from this language WMI does not seek to recover damages for breach of contract (which, incidentally, would be limited to recovery of the contract

price of $13,228 under Ohio law). Nor does WMI seek damages for common law negligence or breach of an implied warranty (which would be barred by the applicable Ohio statute of limitations relating to those torts). Rather, WMI wants EDA to fully reimburse WMI for the $3,000,000 it was required, by jury verdict, to pay to Atlantic Mutual at trial. This is not a claim for "damages" devolving from breach of contract or negligence, but a claim for "indemnification."

There is nothing contained in the pleadings to suggest, nor has Petitioner argued, that WMI is entitled to indemnification pursuant to an *express* indemnification clause in the sales contract between WMI and EDA. Indeed, the parties agree their contract did not contain an express indemnification clause. Consequently, the only remaining cause of action available under Ohio law permitting WMI to secure "complete reimbursement" from EDA, under these circumstances, is a claim for "*implied* indemnification." Under Ohio law, "implied indemnification" is defined as the right of a party secondarily liable in tort (or passively negligent), to obtain complete reimbursement from another tortfeasor who is primarily liable in tort (or actively negligent).

Applying principles of Ohio common law, the District Court below correctly held an implied contract for indemnity exists *only* within the context of a relationship wherein one party is found to be vicariously liable for the acts of a tortfeasor. However, the trial court also noted, correctly, that the relationship between WMI and

EDA was one of contracting parties, *not one of related tortfeasors*:

> Wagner-Meinert was not found vicariously liable for EDA's actions. It paid Atlantic damages after a jury found it breached a contract with FSI. (App. C8-C9)

For these reasons, it was unnecessary for the District Court and the Court of Appeals to even consider Petitioner's "breach of contract" claim in the first place. In fact, all issues relating to the "nature" of the WMI/EDA contract, and the proper statute of limitations to be applied to that contract, were irrelevant, and did not need to be addressed by the lower Courts at all. The only issue which *should* have been considered was whether WMI was entitled to indemnification based upon principles of active/passive negligence or primary/secondary tort liability under Ohio law.

Thus, Petitioner has mischaracterized the ". . . issue which would properly be before the Court if certiorari were granted." If certiorari is granted, the issue before the Court should be expressed as follows:

> Whether a plaintiff seeking complete reimbursement from a defendant of a jury award in favor of a third party for breach of contract, has stated a cognizable claim for implied indemnification under Ohio law, where the relationship between plaintiff and defendant is one of contracting parties, and not related tortfeasors?

Although Respondent raised this argument previously, the lower courts apparently decided to give Petitioner's Complaint the "benefit of the doubt," and construed the Complaint as though Petitioner was actually seeking contract damages, rather than indemnification. Even under a "breach of contract" analysis, however, the lower Courts correctly analyzed the contract issue, and correctly sustained Respondent's motion for judgment on the pleadings on that basis. However, if a writ were to issue in this case, the issue on appeal should not involve whether the six or fifteen year statute of limitations applicable to Ohio contracts would apply, or how the predominant purpose test should be applied, as suggested by Petitioner. Based upon the nature of the relief sought in the Complaint, the only issue for this Court's consideration is whether a non-tortfeasor can maintain an action for complete reimbursement of a jury award for breach of contract, under a theory of implied indemnification in tort, under Ohio law.

## REASONS FOR DENYING THE PETITION

There are several compelling reasons why certiorari should not be granted. In this case, the Petition fails to satisfy *any* of this Court's criterion for a grant of certiorari, as specified in Supreme Court Rule 10.

## I.

## THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY DECISION OF ANY OTHER COURT OF APPEALS.

The decision of the Sixth Circuit below does not conflict with any decision of this Court or any decision of any other Court of Appeals. Accordingly, the Petition does not provide a sufficient basis for granting a writ of certiorari. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1954); *Davis v. United States*, 417 U.S. 333, 340 (1974) (where there was recognition that ordinarily, even an intra-circuit conflict or a conflict between decisions rendered by different panels of the same court is not a sufficient basis for granting a writ of certiorari). Here, there is no conflict of any kind.

## II.

## THE SIXTH CIRCUIT'S DECISION WAS CORRECTLY DECIDED.

The decision of the Court of Appeals, below, which affirmed the decision of the United States District Court for the Northern District of Ohio, sustaining Respondent's Motion for Judgment on the Pleadings, was correctly decided. Historically, this Court has held that it is not "a court for correction of errors in fact finding" and "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Also see

*Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Doe*, 465 U.S. 605 (1984). In the present case, there is no error below, much less a "very obvious and exceptional show of error," which would merit the grant of certiorari.

For the reasons articulated at Pages 4-8, above, it was unnecessary for the District Court and the Court of Appeals to consider WMI's arguments relating to its contract and negligence claims because WMI was not really seeking contract or negligence damages. Rather, WMI sought complete reimbursement of a jury award based upon a theory of implied indemnification under Ohio common law. However, the lower Courts elected to construe the Complaint broadly, and considered Respondent's Motion for Judgment on the Pleadings as if WMI had actually asserted negligence and contract claims in the Complaint. The lower Courts then correctly applied Ohio law principles pertaining to commercial contracts, correctly analyzed the issues presented, and correctly sustained Respondent's Fed. R. Civ. P. 12(c) motion. Specifically, the District Court determined the breach of contract claim was barred by the four-year statute of limitations for contracts relating to the sale of goods under O.R.C. § 1302.98(A). (An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.) Wagner-Meinert disagreed and, on appeal, claimed the underlying contract was primarily one for services, not subject to the UCC four-year statute of limitations, but subject to the fifteen-year statute of limitations for written contracts generally.

Both the District Court and the Sixth Circuit concluded the WMI/EDA contract should be characterized as one for the sale of a good, i.e., a contract for the sale of the "ammonia detection system," a tangible good. The Courts also identified the "contract" in this case as the written contract for the sale of the ammonia detection system the Petitioner attached to its Complaint in this case as Exhibits "A" and "B" (*i.e.*, the "offer," and the "acceptance," respectively). Because the $13,228 contract price included a $600, one-day, On-Site Start-Up Assistance *option*, the contract was correctly characterized as a "mixed" contract:

> In a mixed contract for goods and services, the test for inclusion or exclusion under section 1302.98 with its four-year statute of limitations is "whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved." Court of Appeals Opinion, Page B-6 (App. B1-B9).

The District Court, then, correctly applied the "predominant purpose test" to this mixed contract, and concluded, as a matter of law, the contract was one primarily relating to the sale of a good.

The Sixth Circuit agreed, noting there existed no factual dispute as to the nature of the sales contract at issue, and that it was "proper for the District Court to rule as a matter of law on the nature of the contract and to determine that the four-year statute was applicable." Court of Appeals Opinion at B6. (App. B1-B9) For this

reason, both the District Court and the Court of Appeals determined the applicable statute of limitations with respect to the contract for the sale of the ammonia detection system expired in 1999, four years after execution of the sales contract in 1995, thereby barring Petitioner's claim for breach of contract which may have been alleged in the Complaint.

Petitioner objects to this ruling, and seeks writ of certiorari for two reasons: 1) the lower courts misapplied Fed. R. Civ. P. 12(c) by not construing the allegations set forth in the Complaint most favorably in WMI's favor; and 2) the lower courts misapplied Ohio law by failing to hold that the application of the "predominant purpose test" to mixed contracts in commercial sales transactions must, in all cases, be determined by the jury as a matter of fact, rather than by the court, as a matter of law. Respondent will address each argument separately.

**A. Contrary To Petitioner's Assertion, An Allegation In A Complaint That An Oral Contract *May* Exist Which *Might* Afford A Basis For Recovery Does Not Preclude An Award For Judgment On The Pleadings Under Fed. R. Civ. P. 12(c).**

Neither Respondent, nor the lower Courts in this case, disagrees with Petitioner's observation that when considering a Fed R. Civ. P. 12(c) motion, the trial court is obliged to construe the allegations contained in a complaint most strongly in plaintiff's favor. The District Court did so in this case. Although Petitioner acknowledges the existence of an express, written contract for the sale of the ammonia detection system and the one-day *optional* start-up service (WMI attached

the written agreement to the Complaint as an exhibit), Petitioner argues that the Complaint also refers to the possible existence of "other" contracts, such as "oral" contracts, or "implied" contracts between the parties which, depending upon their terms, may have provided a basis for imposing liability for indemnification upon EDA in this case. As such, WMI argues it should have been permitted to conduct discovery for the purpose of determining whether such oral contracts "existed" and, if they did exist, discover the terms of those contracts.

While the Complaint makes oblique reference to possible "oral" or "implied" agreements, the Complaint does not allege *any* of the material terms attendant to those agreements including the subject matter of the contracts, the terms of the contracts, or the consideration for the contracts. Nevertheless, Petitioner argues that because the Complaint refers to the *possible* existence of additional oral contracts between the parties, the grant of judgment on the pleadings was improper and Petitioner should have been afforded the opportunity to conduct discovery for the purpose of: 1) identifying those oral contracts, 2) identifying the material terms contained in such contracts, and 3) determining whether the material terms in those oral contracts *might* have afforded WMI some basis for recovery against EDA.

The argument is unsupportable under Ohio law. First, WMI's Complaint did not contain either direct or inferential allegations respecting all of the material elements to sustain a recovery under some viable legal theory. The absence of those allegations, is fatal. As observed by the Sixth District Court of Appeals in

*Scheid v. Fanny Farmer Candy Shops*, 859 F.2d 434 (1988):

> Although this standard for Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements. 5 C. Wright & A. Miller, Federal Practice & Procedure § 1357 at 596 (1969). **"In practice, 'a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.'"** *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (quoting *In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125, 103 S. Ct. [*437] 3100, 77 L. Ed. 2d 1358 (1983)), *cert. denied*, 470 U.S. 1054, [**6] 105 S. Ct. 1758, 84 L. Ed. 2d 821 (1985); *see also Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); 5 C. Wright & A. Miller, Federal Practice & Procedure § 1216 at 121-23 (1969). As the First Circuit stated, "we are not holding the pleader to an impossibly high standard; we recognize the policies behind rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) *cert. denied*,

431 U.S. 914, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977). *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436-437. (Emphasis added.)

WMI's Complaint does not allege any of the "material elements" necessary to support a claim for breach of oral contract, other than identifying EDA and WMI as the parties to the verbal contract. Nor does the Complaint identify any material elements of the oral agreement not otherwise contained in the written contract which Petitioner now appears to claim, in its Petition for Writ, is not a written contract at all! Instead, WMI simply argues an oral contract *may* have existed, and that such a contract *may* have contained additional material terms not included in the written contract document Petitioner appended to the Complaint. This is insufficient and, as a consequence, WMI's claim for "breach of oral contract" cannot succeed, on the basis of *Scheid, supra.*

The "possible oral contract" claim is barred for a second reason: By alleging breach of contemporaneous written and oral agreements dealing with the same sales transaction, Wagner-Meinert is, in effect, asking the Court to rewrite the agreement between the parties. This argument, however, is barred on the basis of Ohio's parol evidence rule.

In *Glazer v. Lehman Brothers, Inc.*, 394 F.3d 444 (2005), the U.S. Sixth Circuit Court of Appeals discussed Ohio's parol evidence rule in detail. In doing so, the Court

relied, in part, upon the Ohio Supreme Court's decision in *Galmish v. Cicchini*, 90 Ohio St.3d 22 (2000):

> The parol evidence rule, as construed by Ohio courts, states "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 2000 Ohio 7, 734 N.E.2d 782, 788 (Ohio 2000) (citing 11 Williston on Contracts 569-70, § 33.4 (4 Ed. 1999)). Thus, absent fraud, mistake or some other invalidating cause, prior or contemporaneous oral agreements may not be used to alter, contradict, contest, or vary an integrated written agreement. *Galmish*, at 788. Contrary to its name, this rule is one of substantive contractual, not evidentiary, law. *Id.*, *Glazer*, at 455.

Where a written contract exists, extrinsic evidence must be excluded as a matter of substantive Ohio contract law, because such evidence cannot ". . . serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." *Galmish* at 789.

> The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes

> said, the written memorial supersedes these prior or contemporaneous negotiations. *Id.* at 788-89 (citation omitted); accord *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 612 (6th Cir. 2001) (citing *Galmish* and stating "the parol evidence rule does not operate to prohibit proof of terms of the agreement; instead, it provides that parol terms are not terms of the agreement at all"). The principle policy behind the rule is to protect the integrity and purpose of written agreements. *Galmish*, at 789 (citation omitted).

Therefore, to the extent Petitioner's argument that Respondent's Motion for Judgment on the Pleadings was improvidently granted because the lower Courts failed to consider Respondent's potential liability under unspecified oral agreements alleged in the Complaint, the argument cannot succeed. The Courts properly considered the only contract before them, *i.e.*, the written agreement appended to the Complaint filed in this case. In doing so, the lower Courts correctly construed the Complaint in light of the requirements set forth in Fed. R. Civ. P. 12(c), and properly dismissed the Complaint for failing to set forth a legally cognizable claim upon which relief could be granted.

**B. Where The Service Portion Of A Mixed Contract Constitutes Less Than Five Percent Of The Contract Price, The Lower Courts Properly Determined, As A Matter Of Law, That The Contract Was Primarily One Involving The Sale Of Goods, Rather Than The Sale Of Services.**

In its Petition, WMI urges adoption of a universal rule in connection with the administration of the "predominant purpose test" applied to "mixed contracts" in commercial sales transactions. Specifically, Petitioner requests the Court to hold that the "predominant purpose test" should only be applied to mixed contracts by the jury or trier of fact, and not by the trial court "as a matter of law." The invitation to adopt such a rule should be declined.

Petitioner's brief fails to cite a single decision holding that a trial court is not permitted to apply the "predominant purpose test" as a matter of law, to determine whether the contract reviewed is one "primarily for the sale of goods," or one "primarily for the sale of services." There *is* authority, however, for the proposition that whether the "predominant purpose test" should be administered by the court, or by the trier of fact, depends upon whether "reasonable minds could reach different conclusions as to whether the contract was predominantly a goods transaction or predominantly a service transaction." *C.G. Mahan Constr. Co. v. Valspar Corp.*, 30 Fed. Appx. 381 (6th Cir. Feb. 11, 2002).

In this case, the "service" portion of the contract (*i.e.*, the $600 one-day start-up service *option*) was less than five percent of the $13,228 contract price. It is difficult

to imagine how "reasonable minds" would not conclude that the primary purpose of this contract was anything other than a contract for the sale of goods. By definition, the one-day, start-up service was an "*option*," clearly ancillary to the contract for the sale of the ammonia detection system itself.

In response, WMI argues the underlying Complaint alludes to the possible existence of collateral "oral" and/or "implied" contracts which *may* have required EDA to perform "services" *other* than those articulated in the written contract attached to the Complaint. Once again, in the absence of any specific allegations contained in the Complaint articulating the material terms of these elusive verbal agreements, the argument does not persuade. *Scheid, supra.*

The Sixth Circuit correctly affirmed the District Court's decision to sustain Respondent's Motion for Judgment on the Pleadings, filed pursuant to Fed. R. Civ. P. 12(c). The District Court was not obliged to consider the possible effect of verbal contracts not specifically articulated in the Complaint, upon the Petitioner's "breach of contract" claim. The District Court was obliged to consider only the issues raised in the Complaint with respect to the written contract appended to it.

## III.

## THE CASE DOES NOT INVOLVE IMPORTANT ISSUES OF LAW.

This case does not involve any important statutory or constitutional issues, state or federal, which merits review by this Court. The case involves routine disposition of a motion for judgment on the pleadings filed under Fed. R. Civ. P. 12(c). As such, the case is an unappealing candidate for review, since even the presence of admittedly "serious legal questions" is generally not sufficient for the grant of certiorari. *English v. Cunningham*, 361 U.S. 905, 904 (1969).

## IV.

## THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS BELOW TURNED UPON AN ANALYSIS OF THE PARTICULAR FACTS INVOLVED IN THE CASE.

The decision of the Sixth Circuit Court of Appeals turned upon the fact-bound application of settled state law and an analysis of the particular facts involved. These facts include the following: (a) the Complaint alleges the existence of a written contract for the sale and purchase of an ammonia detection system, valued at $13,228. The contract price included a one-day, initial start-up service option, valued at $600; (b) a copy of the written contract was appended to the Complaint, as Exhibit A (offer), and Exhibit B (acceptance); (c) the Complaint fails to articulate the material terms sufficient to establish the existence of an oral or implied contract between the

parties; and (d) the Complaint does not allege, nor does the procedural history of the underlying case suggest, that Wagner-Meinert was liable *in tort* for the fire which occurred at Frozen Specialties, Inc. on June 16, 1999. As such, Petitioner would not be entitled to recover against Respondent, as a matter of Ohio law, for either implied indemnification or statutory contribution among joint tortfeasors.

This Court generally denies certiorari when review is sought of a lower court decision which turns upon an analysis of the particular facts involved. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Also see *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

## V.

## THIS IS NOT AN APPROPRIATE CASE FOR REVIEW BY THIS COURT.

Petitioner seeks review of the lower courts' decision to sustain Respondent's Motion for Judgment on the Pleadings, on the basis that Fed. R. Civ. P. 12(c) was "misapplied." Specifically, Petitioner disagrees with the lower courts' conclusions regarding whether the Complaint articulated a claim for breach of an oral contract. Petitioner claims to seek review because this Court can provide "guidance" to "courts throughout the country" for the purpose of ". . . determining when and under what circumstances a judgment on the pleadings should be rendered." However, what the Petitioner really wants, of course, is a different result.

WMI's invitation for Supreme Court review of the Motion for Judgment on the Pleadings in this case should be declined. The standard under which a Fed. R. Civ. P. 12(c) motion is decided is not the issue here. The Rule does not require "clarification." Motions for judgment on the pleadings, by definition, are invariably case-specific, and the trial court's decision to grant, or deny, such a motion always depends upon whether the Complaint pleads facts, assumed to be true, showing the pleader may be entitled to relief.

In this case, Petitioner attached to the Complaint a written contract, involving the sale of goods with incidental services, which did not contain an express indemnification clause. The Complaint failed to allege WMI had been adjudicated a "tortfeasor," yet alleged WMI was entitled to complete, implied indemnification from EDA on the basis of Ohio common law. Under these circumstances, the Complaint did not demonstrate, on its face, the Petitioner was "entitled to relief" for the purpose of defeating a motion for judgment on the pleadings.

This case involves no state or federal constitutional question, no issue of federal law, and no issue of great and general public importance. The Sixth Circuit's decision does not conflict with any decision rendered by this Court, any U.S. Circuit Court decision, or any decision of the Ohio Supreme Court. Nor did the lower courts apply Fed. R. Civ. P. 12(c) in a manner inconsistent with earlier decisions, or in a manner inconsistent with the standard applied in other federal jurisdictions. Under these circumstances, there is no justifiable basis for review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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